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Attorneys for Objector Susan House

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SCHUYLER HOFFMAN, individually and
on behalf of all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Case No. 3:12-cv-539 JAH (DHB)

**RESPONSE OF OBJECTOR SUSAN
HOUSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR FINAL
APPROVAL AND MOTION FOR
ATTORNEY FEES**

Date: September 22, 2014

Time: 2:30 P.M.

Courtroom: 13b

Hon. John A. Houston

**A. The Class Did Not Receive Adequate Notice: Bank Of America Must Provide
Direct Notice To Its Mortgage Clients.**

We learn from the Motion for Final Approval that although the class consists of 1,454,181 persons, only 892 people submitted claims. This spectacularly low claims rate (approximately 6/100 of 1%) is explained as a result of the fact that not all class members were actually subject to unrecorded claims. We also learn that the settlement website only received 1,081 visits (again less than one tenth of one percent of the class) and that 369 class members contacted the settlement administrator to discuss the Class Notice,

1 their options, and the case status telephonically. Memorandum of Law in Support of
2 Final Approval Motion, Doc. 56-1, page 12. Although the \$1,811.08 consideration may
3 be a favorable result for those class members submitting claims, the overall results must
4 be judged in terms of the recovery for the entire class. We would ask the court to
5 consider the rights of the 1,453,289 class members who did not submit claims, and
6 1,453,100 class members who did not visit the settlement website.

7 Class Counsel have claimed direct notice is impracticable because Bank of
8 America retained the recordings of telephone conversations for only 60 days, and without
9 these recordings, it is impossible to ascertain who was recorded and who was not and, of
10 those who were recorded, who received the disclosure and who did not. This problem
11 underscores our argument that this action may not be suitable for class certification
12 because it is impossible to determine who is a member of the class and who is not.

13 Leaving this aside, it is clear that the majority of potential class members are Bank
14 of America's mortgage customers (current or previous). Contrary to Class Counsel's
15 assertion that direct notice is not necessary, Fed. Rule Civ. Proc. 23(c)(2)(B) clearly
16 states that the parties are required to provide "the best notice that is practicable under the
17 circumstances, including individual notice to *all* members who can be identified through
18 reasonable effort." Defendants also claim direct notice is not necessary because the
19 class includes "Defendant's former customers who had defaulted on their mortgages and
20 no longer live at the same addresses." (Doc. 56-1, page 26) In fact, although certainly
21 there have been many foreclosures over the last several years, surely Bank of America
22 has contact information for many current and former clients. Rule 23 requires individual
23 notice to those clients. Although mortgage foreclosures are high, according to a by
24 Moody's Investor Services, as analyzed by *Propublica* (a non-profit public interest
25 research organization), Bank of America delayed processing of foreclosures and home
26 modifications, so many of those in default on their mortgages were not actually been
27
28

1 foreclosed on in a timely fashion. These are the customers most likely to have had
 2 telephone calls with Bank of America's mortgage department, and are likely the class
 3 members who would fill out the claim form if aware of the potential benefits available
 4 under the settlement. See "By the Numbers: A Revealing Look at the Mortgage Mod
 5 Meltdown", available at <http://www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown> (reporting that "The largest servicers, especially
 6 Bank of America, have left most struggling homeowners in limbo without either
 7 modifying or foreclosing.") We would ask the court to recognize that the client
 8 relationship at issue here is not a casual one – Bank of America is or was in the past owed
 9 hundreds of thousands of dollars by their mortgage clients: we can assume Bank of
 10 America's records are not so deficient that they cannot possibly reach a fair number of
 11 these clients.
 12

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 14 **B. The Court Should Be Aware Of Potential Undisclosed Conflicts Of Interest.**

15 The attorneys working together on this class action lawsuit have a history of joint
 16 work in class action settlements. The court will note a high degree of overlap between
 17 the cases cited in the declarations of Joshua Swigart and Abbas Kazerouni. Although this
 18 violates no rules of professional misconduct *per se*, it suggests that fee requests in
 19 particular should be scrutinized with some care. In *Rose v. Bank of America*, Case No.:
 20 5:11-CV-02390-EJD, the judge was troubled by what appeared to be unnecessarily
 21 duplicative work on the part of attorneys who had worked together on multiple lawsuits
 22 and appeared to have the same pattern of unnecessarily duplicative work, despite their
 23 protestations to the contrary. See Order Granting Motion For Final Approval Of
 24 Settlement; Granting In Part And Denying In Part Motion For Attorney's Fees And
 25 Costs, Case No.: 5:11-CV-02390-EJD, Doc. 108, (N.D. Cal. Aug.29, 2014), attached
 26 hereto as Exhibit A. After a detailed analysis of the lodestar information provided by
 27 Class Counsel, the judge reduced the total hours claimed by 960 hours (from 2560.7
 28 hours to 1700.7 hours), and also reduced the lodestar multiplier from 8.65 to 2.59. The

1 overall fees awarded were thus \$2,402,243.91, rather than the \$8,020,976.00 requested by
2 Class Counsel.

3 Unfortunately, in this case Class Counsel did not provide sufficiently detailed
4 information on the types of work performed by individual attorneys to enable the court to
5 analyze whether an inordinate number of attorneys were present at settlement
6 negotiations, or doing duplicative work during other phases of the litigation. As we
7 suggested in the Objection, given the similarity of this case to other similar cases,
8 specifically *Knell v. FIA Card Services*, Case 3:12-cv-00426-AJB-WVG, we are
9 concerned about overlap and double billing for brief preparation and legal research. As
10 we noted, a review of the pleadings and motions filed in the two cases show the cases are
11 nearly identical in many respects – except in responding to the objection.

12 **C. The Class Representative may be subject to a conflict of interest.**

13 Our analysis of *Knell v. FIA Card Services* has raised additional concerns. Since
14 filing the objection we learned that Schuyler Hoffman, named plaintiff in this case, was
15 also named plaintiff in at least two similar cases filed within a few days of this litigation.
16 Both *Hoffman v. Wells Fargo Bank, N.A.*, Case No. 3:12-cv-00554, (S.D. Cal.)(complaint
17 filed March 5, 2012) and *Hoffman v. Cenlar Agency, Inc.*, (Case No. 12cv414 L(NLS))
18 2013 WL 1285126 (S.D.Cal.,) (ruling on motion to dismiss dated March 27, 2013
19 attached hereto as Exhibit B) concerned allegations related to a single telephone call. Mr.
20 Hoffman, who is himself an attorney and named partner in the firm of Hoffman & Forde,
21 graduated from the California Western School of Law in 2007, as did Mr. Kazerourni.
22 According to the firm's website:

23 Hoffman & Forde, Attorneys at Law is a boutique law firm that
24 specializes in mortgage negotiations, loan modifications and loan
25 workouts, residential and commercial real estate transactions,
26 bankruptcy, and estate planning. We use our extensive knowledge,
27 experience, and expertise to stop foreclosures, restructure terms of
28 debt, negotiate short sales, navigate federal bankruptcy laws and
quickly assist in unlawful detainer actions. We also protect

1 homeowners from predatory lending practices and engage in business
2 and consumer litigation.

3 The named plaintiff in *Knell v. FIA Card Services, supra*, Katie Susan Knell,
4 appears to be an associate attorney at the firm of Hoffman & Forde in San Diego (the
5 firm of the named plaintiff in this case). According to the firm's website, Ms. Knell
6 earned her Juris Doctor Degree in April 2012 from the California Western School of
7 Law, and was admitted to the California Bar in December of 2012. As a member of
8 Hoffman & Forde, Ms. Knell presumptively also represents homeowners in loan
9 modification and restructuring transactions.

10 Since Hoffman & Forde is actively engaged in representing homeowners with
11 defaulted mortgages, or homeowners otherwise interested in modifying their mortgages,
12 Mr. Hoffman has no doubt represented many potential claimants in this lawsuit, raising
13 conflict of interest issues. We believe the court should require additional investigation to
14 determine if Mr. Hoffman's clients have waived his conflict of interest related to this
15 case. This settlement will release their claims – potentially worth thousands of dollars;
16 they should know that their attorney is receiving financial compensation in this case. *See*
17 State Bar Rule 3-310: Avoiding the Representation of Adverse Interests. In addition, we
18 are concerned that Mr. Hoffman may have improperly notified some of his clients of the
19 benefits of participating in this Settlement – to the disadvantage of other class members
20 who are not Mr. Hoffman's clients. We also recommend that the court require additional
21 information from Mr. Hoffman and the Settlement Administrator to determine how many
22 of his clients have submitted claims under this litigation.

23 Finally, we are also concerned that Mr. Kazerouni may be improperly
24 compensating his attorney friends who serve as class representatives. Mr. Hoffman was a
25 classmate of Mr. Kazerouni, which raises a question as to the independent judgment he is
26 exercising in his service as class representative, but also raises questions as to Mr.
27 Kazerouni's arrangements with his friends and colleagues. Improper compensation of
28 class representatives has been a problematic issue for class action attorneys in the past,

and the court must be vigilant in this area. Based on a cursory review of Mr. Kazerouni's other cases, it appears other attorneys frequently serve as class representatives in his cases. The recent case of *Eubank v. Pella Corp.*, 13-2091, 2014 WL 2444388 (7th Cir. June 2, 2014), decided by Justice Posner, highlighted the unfairness that can result when class representatives and class counsel have a pre-existing relationship and/or improper lack of independence. *See Eubank*, at *3 (Noting "The case underscores the importance both of objectors (for they are the appellants in this case—without them there would have been no appellate challenge to the settlement).

D. Conclusion

Class Counsel seek to trivialize the objection through *ad hominem* attacks on objectors' counsel. We respectfully submit that the lack of independence of the class representative raises issues as to the overall fairness of this settlement. Similarly the attorneys have raised concerns over the extent of their work, given the multitude of nearly identical lawsuits filed with the same allegations, albeit different defendants. The low claims rate, combined with a lack of individual notice, further argues against approval of this Settlement

LAW OFFICES OF DARRELL PALMER PC

Dated: September 8, 2014

By: /s/ Joseph Darrell Palmer

Joseph Darrell Palmer
Attorney for Objector Susan House

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I electronically filed the foregoing with the Clerk of the Court of the United States District Court for the Southern District of California by using the USDC CM/ECF system.

I certify that all participants in the case who are registered CM/ECF users that service will be accomplished by the USDC CM/ECF system.

/s/ Joseph Darrell Palmer
Joseph Darrell Palmer